Supreme Court, U.S.
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No. 92-1112

In The

Supreme Court of the United States

October Term, 1992

PELE DEFENSE FUND,

Petitioner,

vs.

WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Hawaii Supreme Court correctly held that claims under 42 U.S.C. § 1983 against state officials acting in their official capacities were barred as seeking retrospective relief, where the claims arose out of a completed land exchange between the state defendants and private parties, and where the federal courts had previously dismissed claims arising out of the same transaction against the same state defendants on the ground that the claims sought impermissible retrospective relief.

Whether Haw. Rev. Stat. § 657-7 (1985), which provides for a two-year statute of limitations for "recovery of compensation for damage or injury to persons or property," is the appropriate statute of limitations to be applied to a § 1983 action filed in Hawaii, where the highest court of the state ruled, in connection with its decision in this case and in light of *Owens v. Okure*, 488 U.S. 235 (1989), that that statute is the general personal injury statute of limitations.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents The Estate of James Campbell, Deceased, W.H. McVay and P.R. Cassiday, Trustees Under the Will and of the Estate of James Campbell, Deceased, acting in their fiduciary and not in their individual capacities, Herbert C. Cornuelle and F.E. Trotter[1] (singularly and collectively, the "Campbell respondents") respectfully request the Court to deny issuance of the writ of certiorari requested by petitioner.

The petition for writ of certiorari was received by counsel for Campbell respondents on January 4, 1993. This brief in opposition is timely filed pursuant to Supreme Court Rule 15.2.

STATEMENT OF JURISDICTION

As argued in this brief, the Court lacks discretionary jurisdiction to consider petitioner's first and third questions presented, as well as a number of arguments made by petitioner with respect to petitioner's second question presented, in that the questions or arguments were never presented to the Hawaii Supreme Court, and thus are not specially set up or claimed as required by 28 U.S.C. § 1257.[2] *Pa. R.R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 462-63

[1] Mr. Cornuelle and Mr. Trotter are former trustees of the Estate of James Campbell.

[2] Campbell respondents note that petitioner has failed to comply with Supreme Court Rule 14.1(f), which requires petitioner to include in the statement of the case "the stage in the

(1936); *Food Employees v. Logan Plaza*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting).

STATEMENT OF THE CASE

This petition is the latest stage of protracted litigation which has been maintained by petitioner or its privies as part of an attempt to frustrate and stop alternative energy development on the Island of Hawaii. The transaction which is the subject of this suit was previously before this Court by way of a petition for certiorari review in *Dedman v. Board of Land & Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988).

The present suit, like *Dedman*, arises out of a land exchange between the state of Hawaii and Campbell respondents for the purpose of facilitating development of geothermal energy.[3] On December 23, 1985, the state and Campbell respondents exchanged deeds by which Campbell respondents received title to state lands in Puna on the Island of Hawaii, subject to the exchange not being disapproved by the Hawaii legislature. Haw. Rev.

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proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts." Failure to make such a showing in itself bars presentation of the question. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

[3] A detailed statement of the extensive administrative proceedings and contested case proceedings in 1984 and 1985 which led up to the exchange can be found in the Hawaii Supreme Court's reported opinion in *Dedman*.

Stat. § 171-50(c) (1985). The exchange became final when the legislature failed to disapprove it by April 23, 1986, the last day of the 1986 legislative session.

As part of public hearings and other administrative proceedings connected with the exchange, Ralph Palikapu Dedman ("Dedman"), Dr. Noa Emmett Aluli ("Aluli"), Lehua Lopez ("Lopez") and others initiated a series of four contested case proceedings before the Hawaii state Board of Land and Natural Resources ("BLNR"). During those proceedings they raised state statutory, constitutional and breach of trust claims. *See,* Petition ("Pet."), Appendix ("App.") B, at 64a-67a. Dedman and Aluli appealed BLNR's adverse decision to the Hawaii Supreme Court, alleging on appeal that their religious rights under the first amendment to the United States constitution and under article I, section 4 of the Hawaii constitution would be infringed by the proposed geothermal development, because the development would desecrate the Hawaiian goddess Pele by sapping her of vital heat.[4] The Hawaii Supreme Court, however, held that the proposed development did not substantially burden appellants' religious practices because (1) they had never engaged in religious ceremonies on the land in question, and (2) there was no showing that tapping the heat source would diminish the eruptive nature of the land. *Dedman,* 69 Haw. at 261, 740 P.2d at 32.

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[4] Some believers assert that Pele, the Hawaiian goddess of volcanoes, lives in the Puna area, and is manifested through volcanic and other phenomena. *Dedman,* 69 Haw. at 259, 740 P.2d at 31.

Dedman and Aluli then filed a petition in this Court for certiorari review of the Hawaii Supreme Court decision. On April 25, 1988, the petition was denied. 485 U.S. 1020.

The same day this Court denied certiorari in *Dedman*, Dedman, Aluli and Lopez, now reconstituted as the petitioner "Pele Defense Fund,"[5] and Kaolelo Lambert John Ulaleo filed a federal civil rights suit under 42 U.S.C. § 1983 in federal district court for the district of Hawaii against BLNR members in their official capacities. Petitioner sought to invalidate the land exchange as violating § 5(f) of the Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959).

Subsequently, anticipating that its federal action would be dismissed, on March 10, 1989 petitioner filed the instant suit in state court. The original state complaint was virtually identical to its federal counterpart.

On July 26, 1989, the federal action was dismissed for want of jurisdiction on grounds of eleventh amendment immunity. On May 4, 1990, the court of appeals affirmed the dismissal. *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990). The Ninth Circuit, relying by analogy upon this Court's prior decision in *Papasan v. Allain*, 478 U.S. 265 (1986), held that petitioner's federal suit sought impermissible retrospective relief. 902 F.2d at 1399. As the Ninth Circuit stated:

> Although *Papasan* is at least superficially different from this case in that its trust corpus ceased to exist completely, what is important is

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[5] *See* Pet., App. B at 64a.

> the Supreme Court's characterization of the relief sought in the violation of a trust. The complaint is that sometime in the past, the BLNR undertook an action, the land exchange, which allegedly injured the plaintiffs by violating the trust of which the plaintiffs are beneficiaries. There is no allegation that the Board is continuing to violate its trust duties in other ways or that it is likely to do so in the future . . . We hold that to grant the requested relief would be a retrospective remedy, as opposed to stopping an ongoing violation of federal law. If the trust duty was violated, it happened when BLNR executed the exchange. . . .
>
> Plaintiffs' attempt at framing the desired relief as prospective is not persuasive. The Supreme Court's statement in *Papasan* that the trust violation was a past breach coupled with plaintiffs' desire to be *restored* to a prior position supports our conclusion that the district court properly barred suit because of the eleventh amendment.

Id. at 1399-1400 (emphasis in original).

Petitioner did *not* seek certiorari review in this Court of the Ninth Circuit's determination that petitioner sought retrospective relief. Instead, on December 13, 1990, petitioner amended its complaint in state court in the instant case, adding for the first time the Campbell respondents and respondents True Geothermal Drilling Company and Mid-Pacific Geothermal, Incorporated ("True respondents"), who occupied the land pursuant to a lease from the Estate of James Campbell. Although the express request for invalidation of the exchange was dropped, petitioner now requested that a "constructive

trust" be imposed on the land. Pet., App. A at 18a; App. B at 70a.

In contrast to its statement to this Court that it was asserting different § 1983 claims involving different wrongs (*see* Pet. at 9), in its motion for leave to file an amended complaint below petitioner emphasized that all the claims still arose from the same transaction and occurrence, i.e., the land exchange. (*See* Memorandum in Support of Plaintiff's Amended Motion for Leave to File First Amended Complaint for Declaratory and Injunctive Relief, at 8 (Hawaii Supreme Court Record ["R."] 3 at 104)).

A number of defenses were asserted by the state of Hawaii and by the Campbell and True respondents in their answers and subsequent motions to dismiss and for summary judgment, including that the claims were untimely and that principles of *res judicata* and collateral estoppel applied. At no point in responding to respondents' defenses of *res judicata* and collateral estoppel did petitioner argue in the trial court either that federal rather than state preclusion rules should be applied, or that application of federal rules would lead to any different result. Petitioner also did not controvert respondents' assertions of accrual. Pet., App. B at 88a-89a.

On May 20, 1991, the state suit was dismissed in its totality. The trial court, *inter alia*, held that petitioner's claims were collaterally estopped by *Ulaleo's* determination that the claims sought impermissible retrospective relief. Moreover, the trial court indicated it would have come to the same result *independently* even if collateral estoppel principles did not apply, as it was clear that

petitioner's amended complaint sought retroactive relief. Pet., App. B at 75a-78a. The trial court further found that petitioner's claims were untimely, since the claims accrued at the time the land exchange was finalized and were not filed within the two-year time period provided by Haw. Rev. Stat. § 657-7. Pet., App. B at 85a-89a.

In its brief on appeal in the Hawaii Supreme Court petitioner did not challenge the trial court's use of state, rather than federal, preclusion principles. It also did not challenge the trial court's determination that its claims had accrued at the time the land exchange was finalized. (*See* Appellant's Amended Opening Brief in the Hawaii Supreme Court, at 20-21; 33-36; and 44-47.)

The Hawaii Supreme Court affirmed the dismissal of the § 1983 claims. It held that all the claims under § 1983 were subject to the two-year limitations period for injury to persons or property set forth in Haw. Rev. Stat. § 657-7, since that statute was the "general personal injury statute of limitations." Pet., App. A at 25a-29a. The limitations period ran from the date petitioner knew of the land exchange, and had expired. Pet., App. A at 29a.

The Hawaii Supreme Court further held that petitioner's claims were barred by *res judicata* and petitioner was collaterally estopped from raising challenges against the land exchange by virtue of *Ulaleo's* holding that petitioner had sought retrospective relief. Pet., App. A at 29a-31a, 45a-46a. In another section of its opinion the Hawaii Supreme Court also independently concluded on the basis of the record before it that the state's sovereign immunity barred petitioner's state law claims because

they sought impermissible retrospective relief. Pet., App. A at 44a.

Petitioner did not seek reconsideration in the Hawaii Supreme Court. (*See* HAW. R. APP. P 40.)

REASONS CERTIORARI SHOULD BE DENIED

I.

All of the questions presented in the petition are academic if, as the trial court and Hawaii Supreme Court both found, and as the federal district court previously intimated in the federal companion case of *Ulaleo v. Paty*, petitioner's claims were untimely.

In *Owens v. Okure*, 488 U.S. 235 (1989), this Court reaffirmed that "a State's personal injury statute of limitations should be applied to all § 1983 claims." *Id.* at 241. If there is more than one such statute, the Court held that the "residual or general personal injury statute of limitation applies." *Id.* The applicable statute of limitations is a question of state law. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985).

Haw. Rev. Stat. § 657-7 expressly provides that there is a two-year limitations period for actions for the recovery of compensation "for damage or *injury to persons* or property. . . . " (Emphasis added.) Despite the apparently clear language of the statute, petitioner's assertion is that the six-year period of Haw. Rev. Stat. § 657-1(4) for

"[p]ersonal actions of any nature whatsoever not specifically covered by the laws of the State" applies. Petitioner's argument is based solely on petitioner's construction of two prior Hawaii Supreme Court cases, *Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1 (1973), and *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981). Petitioner asserts that these two decisions had determined that Haw. Rev. Stat. § 657-1(4) was the residual statute for personal injury actions.[6]

In its opinion in this action, however, the Hawaii Supreme Court expressly rejected petitioner's interpretation of its prior decisions. The Hawaii Supreme Court pointed out that neither *Higa* nor *Au* were personal injury cases. Pet., App. A at 27a, n.14. It expressly held that Haw. Rev. Stat. § 657-7 is the general personal injury statute. Pet., App. A at 26a-28a.

Petitioner cannot pick and choose which Hawaii Supreme Court decisions are controlling, especially when the Hawaii Supreme Court has expressly held that petitioner's interpretation of its prior decisions is incorrect.

The judicial determination by a state's highest court of what constitutes the correct general limitations period for personal injuries is clearly contemplated and authorized by *Owens*. 488 U.S. at 250 n.12. Thus, there is an

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[6] Although not explicitly set forth in its petition, petitioner's argument rests on this Court's statement in *Owens* that "a residual statute of limitations would apply where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly *or by judicial construction*, unspecified personal injury actions." 488 U.S. at 250 n.12 (emphasis added).

independent and adequate state ground for the Hawaii Supreme Court's decision, which disposes of the petition.

II.

Petitioner's assertion that a state court should select a state statute of limitations that is different from the state statute a federal court would apply to the identical claim is without merit or authority. The claim is the same claim whether asserted in federal court or state court, and the same limitations period should be applied. In any event, this argument was not made below, was not specially set up or claimed, and should not now be reviewed. *Mahiai v. Suwa*, 69 Haw. 349, 354, 742 P.2d 359, 364 (1987) (issues not raised on appeal are waived).

III.

Petitioner further argues that the Hawaii Supreme Court erred in determining accrual of a § 1983 cause of action by reference to state law. Petitioner never raised this issue on appeal, it was not specially set up or claimed, and it should not now be reviewed. In any event, the very fact that petitioner was arguing for a six-year, rather than a two-year, limitations period, shows petitioner also believed the clock was ticking. Despite petitioner's continued assertion in this Court that the alleged wrong was "ongoing," all of the courts which examined petitioner's claims determined that these claims arose by virtue of the completed land exchange. Finally, both Hawaii and the federal courts apply the "know or should have known" standard for determining

accrual, and petitioner cannot demonstrate that a different result would obtain if the Hawaii Supreme Court had expressly applied the federal accrual rule. *Compare United States v. Kubrick*, 444 U.S. 111 (1979) *and Briley v. California*, 564 F.2d 849, 855 (9th Cir. 1977) *with Yamaguchi v. The Queen's Medical Center*, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982).

IV.

Petitioner states that the Hawaii Supreme Court failed to apply federal preclusion principles, and instead improperly utilized state principles of *res judicata* and collateral estoppel. Petitioner, however, never challenged on appeal the trial court's application of state, rather than federal, preclusion rules. Indeed, in its appeal brief petitioner also analyzed the preclusion issue as one of state, rather than federal, law. Thus the question was not specially set up or claimed and should not now be reviewed.

Petitioner also cannot show that the result would be any different had federal preclusion principles been applied. Campbell respondents agree that a dismissal for lack of jurisdiction is not generally a dismissal on the merits. But where dismissal for lack of jurisdiction rests upon a determination that the relief sought is not available under the statute because of the nature of the claims asserted, any subsequent court considering the matter should come to the same conclusion if the nature of the claims remains the same, and therefore the prior determination should be given preclusive effect. To do otherwise would be to create an anomalous situation where relief expressly determined to be barred by one court is

allowed by the second court. *See, e.g., Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (dismissal for lack of jurisdiction precludes relitigation so long as precondition to jurisdiction remains unsatisfied). If Petitioner had had a problem with the Ninth Circuit's holding in *Ulaleo*, it could have sought certiorari review at that time. It did not do so.

In any event, the federal district court and Ninth Circuit in *Ulaleo*, as well as the trial court and Hawaii Supreme Court in this case, all came to the independent conclusion that petitioner's claims impermissibly sought retrospective relief. In this Court petitioner makes much of the fact that it amended its complaint to delete its request for "nullification" and instead substituted a claim for imposition of "constructive trust" to enjoin state officials "to comply with continuing trust obligations." In reality, however, this change is a distinction without a difference, as Hawaii law provides that a constructive trust is simply an equitable device to compel reconveyance of property wrongfully held. *Lee v. Wong*, 57 Haw. 137, 139-40, 552 P.2d 635, 637-38 (1976); *DeMello v. Home Escrow, Inc.*, 4 Haw. App. 41, 48, 659 P.2d 759, 763-64 (1983). Petitioner's pleadings in the record below are replete with assertions that the land in question could not be legally alienated in the first instance, and that any attempt to do so by the state was void. (*See, e.g.*, petitioner's Memorandum in Support of Motion for Preliminary Injunction in the trial court below, R. 4 at 23 (area "illegally withdrawn" from state natural area reserve system); *id.* at 36 (no provision in state law which allowed state "to dispose or otherwise divest" its lands [sic])).

All four courts which examined petitioner's claims concluded that, however characterized, petitioner's claims are functionally indistinguishable from the breach of trust claims unsuccessfully sought to be asserted in *Papasan v. Allain*, 478 U.S. 265 (1978). As this Court stated in *Papasan:*

> The distinction between a continuing obligation on the part of the trustee and an ongoing liability for past breach of trust is essentially a formal distinction of the sort we rejected in *Edelman* [*v. Jordan*, 415 U.S. 651 (1974)] . . . We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners.

Id. at 280-81.

V.

Finally, petitioner implies that the Hawaii Supreme Court in effect extended to Campbell respondents "a derivative form of Eleventh Amendment immunity." Pet. at 10. Petitioner omits to mention that it never challenged on appeal the trial court's dismissal of Campbell respondents upon determining that the case could not continue in the absence of the state.

As expressly stated by the Hawaii Supreme Court on this issue: "PDF failed to appeal from the lower court's conclusion of law ruling that the State is an indispensable party to the breach of trust claims against Campbell and True. Issues not properly raised on appeal will be deemed to be waived." Pet., App. A at 47a.

CONCLUSION

The Court should decline to exercise certiorari review. The decision of the Hawaii Supreme Court was based upon adequate and independent state grounds. Additionally, this Court lacks jurisdiction to consider the other issues before it, as petitioner failed to present them properly below.

Respectfully submitted,

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